

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

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75-2120

To be argued by:
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BARTHELMIO DALLI and
THOMAS PYTEL,

Petitioners-Appellants,

-against-

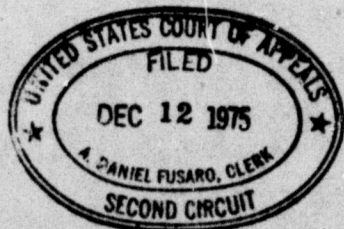
UNITED STATES OF AMERICA,

Respondent-Appellee.

BPS
Docket No. 75-2120

BRIEF FOR PETITIONER-APPELLANT
THOMAS PYTEL

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK



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CONTENTS

Table of Cases and Other Authorities	i
Question Presented	1
Statement Pursuant to Rule 28(a)(3)	
Preliminary Statement	2
Statement of Facts	
A. The Pretrial Suppression Hearing	2
B. The Prior Application Pursuant to	
28 U.S.C. §2255	4
C. The Present Application Pursuant	
to 28 U.S.C. §2255	5
Argument	
The Government's failure to offer any evidence	
rebutting appellant Pytel's proof which showed	
that Federal agents used information obtained	
from the State wiretaps requires a new hearing	14
Conclusion	21

TABLE OF CASES

<u>Alderman v. United States</u> , 394 U.S. 165 (1969)	21
<u>Cross v. M.C. Carlisle & Co.</u> , 368 F.2d 947 (1st Cir. 1966)	15
<u>Dalli v. United States</u> , 491 F.2d 758 (2d Cir. 1974)	5
<u>Dalli et al. v. United States</u> , N.D.N.Y. 74 Civ. 114 (1975)	13

Federal Assurance Company v. Summers, 504 F.2d 971

(1st Cir. 1968)	15
<u>Harris v. Nelson</u> , 394 U.S. 286 (1969)	15
<u>In re Hoagland's Estate</u> , 253 N.W. 416 (Nebraska 1934)	14
<u>Pointer v. Texas</u> , 380 U.S. 400 (1965)	20
<u>Schram v. Cupp</u> , 436 F.2d 692 (9th Cir. 1970)	16
<u>Simmons v. United States</u> , 354 F.Supp. 383 (N.D.N.Y. 1973)	3, 4, 5
<u>United States v. Agueci</u> , 310 F.2d 817 (2d Cir. 1962)	20
<u>United States v. Bowles</u> , 428 F.2d 593 (2d Cir.), <u>cert.</u> <u>denied</u> , 400 U.S. 928 (1970)	16
<u>United States v. Clark</u> , Docket No. 75-1178, slip op. ____ (2d Cir., October 31, 1975)	16
<u>United States v. Dalli</u> , 424 F.2d 45 (2d Cir.), <u>cert.</u> <u>denied</u> , 400 U.S. 821 (1970)	4
<u>United States v. DiRe</u> , 332 U.S. 581 (1947)	17
<u>United States v. Maggadino</u> , 496 F.2d 455 (2d Cir. 1974) ..	21
<u>United States v. Rizzo</u> , 491 F.2d 215 (2d Cir. 1974)	16

OTHER AUTHORITIES

American Bar Association, STANDARDS RELATING TO POST-

CONVICTION REMEDIES (Approved Draft 1968)	14
29 Am.Jur.2d, EVIDENCE (1967)	14
Black's LAW DICTIONARY (4th ed. 1951)	14
C.J.S. EVIDENCE	14

<u>Federal Habeas Corpus</u> , 83 Harv.L.Rev. 1038 (1970)	16
4 Wigmore, EVIDENCE (1967)	14

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BARTHELMIO DALLI and
THOMAS PYTEL,
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Petitioners-Appellants,
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-against- Docket No. 75-2120
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UNITED STATES OF AMERICA,
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Respondent-Appellee.
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Docket No. 75-2120

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

Whether the Government's failure to offer any evidence rebutting appellant Pytel's proof which showed that Federal agents used information obtained from the State's wiretaps requires a new hearing.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Northern District of New York (The Honorable Lloyd F. MacMahon*) rendered on June 12, 1975, after a hearing, denying an application pursuant to 28 U.S.C. §2255 by appellant Thomas Pytel and co-petitioner Barthelmio Dalli for vacature of their sentences.**

This Court appointed The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

A. The Pretrial Suppression Hearing

On May 26, 1969, Thomas Pytel and his co-defendant, Barthelmio Dalli, were convicted after a trial before a jury of selling, receiving, and concealing five kilograms of heroin (21 U.S.C. §§173, 174) and of conspiracy to commit those offenses (18 U.S.C. §371). Prior to trial Pytel

*Judge MacMahon was sitting by designation in the Northern District of New York.

**The opinion of Judge MacMahon denying petitioners' applications is "B" to Pytel's separate appendix.

made an application for suppression of certain evidence, including the heroin which was involved in the transaction which formed the basis of the criminal charges against him. Pytel argued that the evidence was obtained as the result of an illegal arrest. He asserted that the arrest was premised upon information obtained from an illegal wiretap conducted by New York State Police, which information was then transmitted to Federal agents (see Simmons v. United States, 354 F.Supp. 1383, 1384 (S.D.N.Y. 1973*)).

A hearing was held to determine this question.** After the hearing, the District Court denied Pytel's motion to suppress (P.273;*** see Appendix "C" to Pytel's separate appendix at 1342-1344), finding that there was no evidence showing that Federal agents had received any information obtained from the State wiretap, and that the Federal investigation of Pytel and Dalli was independent of any investigation conducted by the New York State Police (Appendix "C" at 280-281).

*This opinion, which also includes as an appendix Judge MacMahon's oral opinion and findings of fact and conclusions of law denying Pytel's motion to suppress, is reproduced as Appendix "C".

**Federal narcotics agents O'Brien, Johnson, Maltz, and Halpin, and State Police Lieutenant Charles Cassino testified at the hearing on the pretrial motion to suppress. Of these five persons, only Cassino testified at the subsequent hearing held pursuant to Pytel's present \$2255 application.

***Numerals in parentheses preceded by "P" refer to pages of the pretrial suppression hearing on the wiretaps.

Appellant's conviction was affirmed in an opinion of this Court, United States v. Dalli, 424 F.2d 45 (2d Cir.), cert. denied, 400 U.S. 821 (1970).*

B. The Prior Application Pursuant to
28 U.S.C. §2255

By petition dated November 16, 1972, Dalli and co-conspirator Stanley Simmons** moved pursuant to 28 U.S.C. §2255 for vacature of the judgments, claiming that evidence admitted at the Dalli trial was tainted by illegal wiretaps conducted by the New York State Police. This application was based in large part on an affidavit of former New York State Police Lieutenant Charles Cassino*** who had testified at the pretrial suppression hearing on the State wiretaps. Cassino alleged that he learned that Federal agent O'Brien periodically reviewed the State wiretaps. This allegation was rejected by the District Court as indefinite, vague, conclusory, and inadmissible, Simmons v. United

*The issue of the suppression of evidence because of the State wiretaps, raised by Pytel's pretrial motion, was not raised on appeal.

**Simmons and Dalli were originally charged with selling, receiving, and concealing heroin, and conspiracy. Simmons fled before trial in 1969, was apprehended in 1971, and pleaded guilty to purchasing heroin. See Simmons v. United States, supra, 354 F.Supp. at 1387.

***Cassino's affidavit is Exhibit #3 to the motion papers filed as part of the present §2255 application and included in the record on appeal.

States, supra, 354 F.Supp. at 1386, and the application was denied without a hearing.

This Court affirmed the District Court's denial of a hearing, holding that Cassino's affidavit was insufficient on its face, and agreed with the District Court that the affidavit was vague, indefinite, conclusory, and marbled with hearsay. Dalli v. United States, 491 F.2d 758, 761 (2d Cir. 1974).*

C. The Present Application Pursuant
to 28 U.S.C. §2255

In order to cure the deficiencies noted by this Court in his previous motion, Dalli submitted additional affidavits,** specifically alleging facts showing that Federal agents had obtained and used information from State wiretaps. In particular, it was alleged that Federal agents O'Brien and Halpin were aware of the State wiretaps and

*This opinion is "D" to Pytel's separate appendix.

**Cassino filed a supplemental affidavit, and former Federal Agent Hart filed an affidavit and supplemental affidavit (Exhibits #3 and #4, respectively, to the motion papers filed as part of the present §2255 application, and included as part of the record on appeal). Also submitted were the results of a polygraph test to which Cassino voluntarily submitted (Exhibit #8 to the present §2255 application). As part of this test, Cassino stated that the Bureau of Narcotics and Dangerous Drugs ("BNDD") was aware of the State wiretaps on the Beautee Trail Beauty Parlor, and that the BNDD would be aware if a wiretap were used in any joint investigation.

had used information obtained from them. After the filing by Dalli of the instant petition pursuant to 28 U.S.C. §2255, Pytel joined in the application (3*). On consent of the Government, an evidentiary hearing was held.

Former New York State Police Lieutenant Cassino, New York State Police Officer Rock, former New York State Police Lieutenant Mermell, and former BNDD Agent Hart and Drug Enforcement Administration ("DEA") Group Supervisor O'Neill testified as part of Pytel's case.**

Former BNDD Agent Hart testified that he participated in the Dalli investigation*** in 1968, and that O'Brien and Halpin were the Federal agents supervising the Federal Dalli investigation (125). During a meeting, and in the presence of Agent Halpin, O'Brien told Hart that there was a wiretap on the Beautee Trail Beauty Parlor. Hart was instructed not to tell anyone else about it (129-132). On August 28, 1968, O'Brien told Hart that the State Police had a wiretap and that State Police Officer Kayner was operating and monitoring it (136), and indicated the location of the monitoring

*Numerals in parentheses refer to pages of the §2255 hearing.

**The deposition of New York State Police Superintendent Kirwan, taken during the course of the proceeding on August 5, 1974, was also made part of Pytel's proof.

***Hart testified that he participated in surveillance of various locations (125), including the Beautee Trail Beauty Parlor, the focus of the investigation (126).

equipment (133-134).^{*} Hart also testified that O'Brien told him not to worry, that "[w]e will know when somebody is going to move" (134-135).

Further, Hart stated that on one occasion he and other Federal agents, as well as New York State Troopers, were given surveillance assignments by Halpin and O'Brien which involved the Dalli investigation (136-138).

On September 7 or 8, 1968, O'Brien told Hart that there was a wire in or around Dalli's apartment in the Bronx (140, 240), and that they would get advance information from that tap about Dalli's movements (139-140, 240). After the arrests, Halpin told Hart to take the State Police officers who participated in the arrests to dinner because they had worked as long and as hard as had the Federal agents (141).^{**}

Hart testified further that at a meeting in the presence of Kayner, Halpin, O'Brien, and other agents, prior to his testimony at Pytel's trial, Hart was instructed not to say anything about his knowledge of the wiretap (144, 151-152, 239).

^{*}Specifically, Hart testified that, while discussing the Dalli investigation, O'Brien stated that he had to check the wire. Hart asked him where it was, and O'Brien pointed to a group of buildings situated in an alleyway near the Beantee Trail (134, 196).

^{**}Hart's records for September 10, 1968, indicate that he spent \$140.20 for dinners for the State Police (142, 154). However, Halpin told Hart that the BNDD would not accept that as a legitimate expense (254). See Exhibit #9 to the motion papers filed as part of the present \$2255 application and included as part of the record on appeal.

Former State Police Lieutenant Cassino testified that he was involved in the Dalli investigation (257-f) and, in August 1968, held a liaison meeting with Federal Agent Halpin about the case (257-h). At that meeting Cassino implied that the police had a wiretap at the Beautee Trail (257-h).^{*} Further, the testimony showed that as a general matter, the State Police officers assigned to Cassino were instructed to cooperate with the Federal law enforcement agencies (257-i, 257-j), and conduct physical surveillance and service the wiretaps (257-i).

Cassino testified that on a number of occasions during August and September, he saw Agent O'Brien and Officer Kayner sitting in a cubicle used for transcribing tapes of wiretaps (257-l) with a tape machine working (325, 327). Cassino also stated that in 1972 O'Brien told him that O'Brien had known about the Beautee Trail wiretaps from their in-

^{*}Cassino was the only person to testify at both the pretrial suppression hearing and the present §2255 hearing. His testimony about this meeting with Halpin is similar to his prior testimony at the pretrial suppression hearing (P.211, P.221).

Halpin testified at the suppression hearing but not at the §2255 hearing. At the pretrial suppression hearing, he testified that he met with Cassino once or twice during August of 1968 and that Cassino had implied that the State Police had a wiretap on the Beautee Trail (P.232), and he assumed that to be the fact (P.243). At that time Halpin was the Enforcement Assistant for the Federal District Bureau of Narcotics, and was in charge of all enforcement for the New York district (P.230-231). Cassino was in charge of a narcotics investigating unit for the State Police (257-d). Liaison meetings between Cassino and Halpin occurred as a matter of course approximately once every six weeks (P.214).

ception (257-o, 362) and that Kayner had told him there were wiretaps in the Bronx and at a location in Brooklyn, in addition to the tap at the Beautee Trail (257-p, 257-q, 331).

Further, Cassino testified that in December 1971 he met with State agents Kayner and Mermel (257-z) to discuss police corruption (303) and how Simmons' attorney had received information prior to the suppression hearing about the Beautee Trail wiretap (257-ac). During one of the meetings, Kayner told Cassino that other Federal agents besides O'Brien knew about the wiretap (257-ac, 295-296).

Senior Investigator Rock of the New York State Police testified that, before August 5, 1968, Cassino ordered him to obtain a wiretap on the Beautee Trail (365) and that the informant mentioned in his affidavit supporting the application for the wiretap was Federal Agent O'Brien's informant (425, 429). Rock spoke to this informant during August (455) and Rock was required to arrange meetings with the informant through O'Brien (455). Further, Rock testified that some information in his affidavit was told to him by O'Brien (411, 430). Rock also stated that, prior to Pytel's arrest, Rock worked with various BNDD agents (372-382), including O'Brien, and that, in addition to specific joint investigations, as a general matter "intelligence" information was exchanged between the State and Federal enforcement agencies (449-450).*

*Former New York State Police Lieutenant Mermel testified that certain State Police investigations conducted between

Rock testified that the plant for the Beautee tap equipment was in a garage in a driveway between two houses (435-436); that he spoke with O'Brien and other Federal agents about the Dalli investigation (440-441; 452; 466; 509); and that he participated in the surveillance of the Beautee Trail and saw Federal agents there, with whom he spoke (446-447, 460, 509-510). Rock further stated that, as a result of information obtained from a wiretap, he expected Ronnie Carr to go to the airport (462) to meet Dalli, who was returning from Italy. At the airport Rock saw a number of Federal agents, including Agents Maltz and Johnson, whom he knew (463).*

Also entered into evidence as part of Pytel's case were two letters commending the efforts of the State Police in the Dalli investigation (261). One of the letters, from

(Footnote continued from the preceding page)

April 1, 1968, and September 10, 1968, were conducted in conjunction with Federal agencies (517). In a deposition taken as part of the proceedings, State Police Superintendent Kirwan stated that the Wards Island detail which had conducted the Dalli investigation was an inter-governmental, cooperating investigating agency (571). This detail was the one commanded by Cassino.

*Rock did testify that, upon instructions, he did not relate any information obtained from the wiretaps to Federal agents (508). Significantly, at the pretrial suppression hearing, Johnson testified that he saw no State Police at the airport and, at the time, did not know that the State Police were investigating Dalli (P.197). This indicates that either Rock or Johnson was lying or that the information about the Dalli investigation was extremely compartmentalized. This would allow for the possibility that O'Brien could have known about the wiretap and used information from it without alerting other Federal agents.

the Department of Justice, recited that Federal agents and State Police conducted an investigation leading to the arrest of Dalli and three other persons (261, 567). As a result of this letter, a number of State Police agents received commendations (262). The other letter was a commendation to Lieutenant Cassino (262) indicating that the arrests of Dalli and Pytel were a direct result of an investigation instituted by the New York City narcotics unit (561).

After the close of Pytel's case, the Government moved to dismiss the petition, claiming that Pytel and Dalli had not fulfilled their burden of proof (606) and that the Government need not proceed to establish the lack of taint (601).^{*} The District Court requested that counsel demonstrate that the proof showed a prima facie case (602). Defense counsel discussed the proof adduced at the hearing and asserted that, in light of the proof, the burden had

^{*}The Assistant U.S. Attorney indicated his belief that he was to assist the court, and attempted to thrust the burden of further proof upon the court. He stated:

There is an obligation here on the part of the Court also which is a little bit different when you are dealing prior to a conviction type of hearing, and if there is an obligation to the Court, I have an obligation to assist the Court, because whether I rest my case or whether I proceed further, the Court could call anyone it wants.

(601).

shifted to the Government (618, 621). The Assistant United States Attorney again denied that the evidence presented had shifted the burden to the Government, and rested his case without presenting any evidence. The District Court reserved decision on the Government's motion to dismiss (624).

On June 13, 1975, the District Court rendered an opinion denying the §2255 application.* Judge MacMahon refused to credit the testimony of both Hart and Cassino. The basis for the Judge's disbelief of the two witnesses was similar tardiness in presenting allegations, demeanor, and violations of law. Some of Cassino's testimony was rejected because of its "utter absurdity" and the structuring of testimony so as not to contradict Cassino's earlier testimony. Hart's testimony was also rejected because of his failure to include statements in contemporaneous notes, his discharge from Federal service, and his need for money.

Further, Judge MacMahon relied on aspects of the testimony of Officer Rock and Agent O'Neill, an affidavit of State Police Officer Kayner,** and on the testimony of Federal

*The opinion is "B" to Pytel's separate appendix.

**This affidavit was submitted in opposition to Dalli's previous §2255 proceeding, annexed as "E" to Pytel's separate appendix.

Agents O'Brien* and Halpin and Lieutenant Cassino given at the 1969 pretrial suppression hearing.** See Dalli et al. v. United States, N.D.N.Y. 74 Civ. 114 at 18, 20.

*Although he was in charge of the Beautee Trail Beauty Parlor surveillance (125), O'Brien was not asked at the pretrial suppression hearing whether he had received any information from the State Police about the defendants.

**Judge MacMahon did not specify why he relied on the testimony of O'Brien, Halpin, and Cassino given at the pretrial suppression hearing in 1969.

ARGUMENT

THE GOVERNMENT'S FAILURE TO OFFER
ANY EVIDENCE REBUTTING APPELLANT
PYTEL'S PROOF WHICH SHOWED THAT
FEDERAL AGENTS USED INFORMATION
OBTAINED FROM THE STATE WIRETAPS
REQUIRES A NEW HEARING.

In a hearing held pursuant to 28 U.S.C. §2255, the initial question which the District Court must determine is whether a prima facie case has been established by the petitioner. American Bar Association, STANDARDS RELATING TO POST-CONVICTION REMEDIES, Approved Draft §4.6(b), Commentary at 76 (1968). This requires the District Court to examine the case "on its face" in order to determine whether the petitioner's case "has proceeded upon sufficient proof to that stage where it will support finding if evidence to contrary is disregarded."* Black's LAW DICTIONARY (4th ed. 1951); C.J.S. EVIDENCE, §1016 at 626; see also In re Hoagland's Estate, 253 N.W. 416, 419 (Nebraska 1934); 29 Am.Jur. 2d EVIDENCE, §5 at 38 (1967).** Thus, the process involved

*Wigmore phrases the question of a prima facie case in the following manner" "Are there facts in evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain?" 4 Wigmore, EVIDENCE, §2494 at 299 (3d ed. 1940).

**The meaning of a "prima facie" case is so clearly understood that it is difficult to find full discussion of the topic.

is similar to that utilized in considering a motion for a directed verdict when a case is tried to a jury.* There, every inference favorable to the proponent must be drawn, and the court cannot weigh conflicting evidence or judge credibility. Cross v. M.C. Carlisle & Co., 368 F.2d 947, 953 (1st Cir. 1966); Federal Assurance Company v. Summers, 403 F.2d 971, 974 (1st Cir. 1968). *re directed verdict cases*

Thus, after Pytel presented his proof and the Government declined to proceed, unless the Court so directed, Judge MacMahon was required to determine whether Pytel's proof constituted a prima facie case. However, the Judge short-circuited this process and, at this juncture in the proceeding, he erroneously examined credibility and determined the case adversely to the petitioners.

Despite Judge MacMahon's explicit** failure to consider Pytel's proof in its correct light, it is clear from the

*Rule 41(b) of the Federal Rules of Civil Procedure need not apply in this case, since these rules have only limited applicability to Federal habeas corpus cases. Harris v. Nelson, 394 U.S. 286 (1969). The applicability of Rule 41(b) to this type of proceeding is inappropriate, for the Government's response to challenges to wiretap procedures is critical to a determination of this highly sensitive issue.

**Implicitly, Judge MacMahon did determine that Pytel and Dalli had satisfied their obligation to show a prima facie case. If the petitioners' case had been insufficient, justification for denial of relief need only deal with the proof adduced at the hearing. However, the necessity to consider credibility and testimony at the previous hearing as well as Kayner's affidavit all indicate that Pytel's case on its face was sufficient.

record that a prima facie case was, in fact, established. The uncontroverted evidence presented at the hearing below unmistakably showed that Federal agents and State Police worked together in the Dalli investigation and that former Federal Agent O'Brien knew about the State wiretaps and used information from them in his investigation and the arrest of Dalli and Pytel.*

Since petitioner established a prima facie case, the Government was required to offer proof in rebuttal.** Schram = pre-arrest hearing over v. Cupp, 436 F.2d 692, 695 (9th Cir. 1970); Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1140 (1970); see also United States v. Rizzo, 491 F.2d 215, 218 (2d Cir. 1974). The Government's failure to come forward, after having been United = after Gov. introduced ev. at Sup. hearing, called by D. prima facie case for Gov.

*Even if the evidence presented were only circumstantial, it would be as probative as direct testimony. United States v. Clark, Docket No. 75-1178, slip opinion (2d Cir., October 31, 1975); United States v. Bowles, 428 F.2d 592, 597 (2d Cir.), cert. denied, 400 U.S. 928 (1970).

**As one commentator has stated:

Traditionally, the petitioner in a federal habeas corpus or section 2255 evidentiary hearing has had to prove by a preponderance of the evidence the facts which support his federal claim. However, the burden of coming forward with rebutting evidence shifts to the government as soon as the petitioner establishes a prima facie case.

Federal Habeas Corpus,
supra, 83 Harv.L.Rev. at
1140.

given that opportunity, requires that this case be remanded for a determination of whether petitioner met his ultimate burden of proof in light of the Government's failure to present contradictory evidence, and for additional findings about the legality of the State wiretaps.

Moreover, not only was Judge MacMahon's decision to evaluate credibility at this juncture of the proceedings improper, but his appraisal of the record was incorrect. Here, the two crucial witnesses -- State Police Officer Kayner and former Federal agent O'Brien -- were available at the hearing and had consulted with the Assistant United States Attorney.* Since both men were available and neither was called, it should have been inferred that the testimony of Kayner and O'Brien would have been unfavorable to the Government. United States v. DiRe, 332 U.S. 581, 593 (1947).

Further, documentary evidence shows that the Dalli investigation was a joint Federal-State enterprise. The letter from the Department of Justice states, in part:

During August 1968 agents of our New York office in company with New York State Police investigators conducted an investigation which led to the arrest of Barry Dalli and three other individuals.

(261-262; 567).

*On two occasions the Assistant U.S. Attorney stated he would call O'Brien (400, 416). Kayner went to dinner with Rock after Rock testified (388-389).

Hart's daily reports indicate that he spent approximately \$120 of Government money for dinners for State Troopers who had assisted in the case (6, 141).^{*} Further, radio and television logs of the BNDD showed that State agent Rock telephoned Federal agent Johnson twice on September 5, 1968, and Federal agent Conner once on September 6, 1968 (501-502), and that Federal agents called Rock on September 7, 1968 (503). These calls occurred just days before the arrest of Dalli and Pytel, during the height of the investigation.

Having established by uncontradicted police records that the case involved a joint investigation, Pytel then established that the State investigating unit was headed by Cassino and that, as a matter of usual procedure, Cassino's unit shared information with the BNDD agents with whom it worked. State agent Rock, whose credibility was not doubted by Judge MacMahon, testified about these facts.**

^{*}See Exhibit #9 to the motion papers submitted as part of Dalli's \$2255 petition and included as part of the record on appeal.

^{**}Rock's testimony was corroborated by former New York State Police Lieutenant Mermel, who stated that certain investigations between April 1, 1968, and September 10, 1968, were conducted in conjunction with Federal agencies (517).

Indeed, State Police Superintendent Kirwan testified that the need for coordination was precisely why then-Governor Rockefeller established Cassino's unit (570-571). Moreover, the degree of cooperation was so intense that, according to State agent Rock, he used Federal agent O'Brien's informant to obtain the State wiretap. All of this uncontradicted evidence, supplied by credible witnesses, supported the testimony of Cassino and Hart and made it likely that their testimony, indicating that information obtained from the State wiretap was utilized by at least former Federal agent O'Brien, was true, and that Judge MacMahon's rejection of their testimony was arbitrary.

Additionally, in evaluating the credibility of Cassino and Hart, the District Court placed reliance on an affidavit prepared by Agent Kayner two years earlier. This affidavit was prepared to controvert the allegations in the earlier §2255 petition which had been denied without a hearing, based on the insufficiency of the petition. Kayner was never a witness and had not been cross-examined about the contents of his affidavit. Further, the truthfulness, at least in part, of that affidavit was challenged by the testimony of Judge Ingrassia at the hearing. Judge Ingrassia, who was a District Attorney in 1968, testified that Kayner applied at the same time for the Beautee Trail wiretap and two other taps (24). Yet Kayner swore in his affidavit "That to my knowledge no other wiretap existed other than the aforesaid

tap at the Beauty Trail in Brooklyn, New York." Appendix "E".

Judge MacMahon's use of this affidavit to evaluate the testimony of sworn and cross-examined witnesses was erroneous. Pytel had no opportunity to cross-examine Kayner, who became, in effect, a witness adverse to his case. See Pointer v. Texas, 380 U.S. 400 (1965).

Further, the criteria used by Judge MacMahon to evaluate the credibility of Cassino and Hart were insufficient on the state of this record to permit his disbelief of their testimony. The Judge referred to their tardiness in coming forward with evidence. However, the purpose of a \$2255 proceeding is to permit the court to hear testimony which is delayed. The Judge noted that Cassino's testimony avoided categorical contradiction of his earlier testimony. Surely this is a positive factor, connoting that Cassino was now revealing the whole of the truth. Hart's physical reaction while testifying was cited by Judge MacMahon as a reason for rejecting his testimony. However, considering the proceeding, the physical manner cited by Judge MacMahon may well have been nervousness.

Since the record establishes that there was a prima facie case shown, the burden of showing no taint became the burden of the Government:

Once the defendants offered evidence of the wiretap, it was incumbent upon the Government to prove that its evidence was not tainted by the tap.

United States v. Agueci,
310 F.2d 817, 834 (2d Cir.
1962).

See also United States v. Magaddino, 496 F.2d 455, 460-461 (2d Cir. 1974); Alderman v. United States, 394 U.S. 165, 183 (1969).

It was error for the District Court to determine the ultimate issue without considering any evidence which might be presented in response or, if the Government chose to present no evidence, in light of that refusal.

CONCLUSION

For the foregoing reasons, the order of the District Court denying the writ of habeas corpus must be reversed, and the case remanded for another hearing and further findings.

Respectfully submitted,

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